

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

EVERETT HATCHER

PETITIONER

Criminal No. CRE92-9

V.

No. 3:95CV157-B

UNITED STATES OF AMERICA

RESPONDENT

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255

This cause is presently before the court on the petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The petitioner has furnished a challenge to his conviction based on the constitutional guarantee of effective assistance of counsel. Upon due consideration of the motion, the memoranda and exhibits submitted by the petitioner, and the record of the criminal case, the court finds that the motion is not well taken and should be denied.

BACKGROUND

On November 9, 1992, the petitioner pled guilty to two counts relating to the possession and sale of LSD. A total of 400 dosage units of LSD were actually sold in the course of the conspiracy between the petitioner and two other indicted individuals. It is undisputed that 125 units or "hits" were involved in the counts the petitioner pled to (Counts 2 and 4), and the weight of the 125 hits of LSD was determined by laboratory analysis to be one (1) gram. The overall weight of all the controlled substances sold by the three conspirators was 2.43 grams.

On March 25, 1993, the petitioner was sentenced to ninety (90) months on Counts 2 and 4, to be served concurrently. The court considered all 400 hits in calculating the sentencing range according to the United States Sentencing Guidelines ("USSG"). The petitioner's counsel objected to the pre-sentence investigation report and was granted a two-point reduction for acceptance of responsibility.

Effective November 1, 1993, the guidelines were amended to add a new calculation method for weight of LSD. See Appendix C, Amendment 488, USSG (November 1, 1993). This amendment was made retroactive, permitting a court under certain circumstances to retroactively modify a defendant's sentence based on the guideline amendment. See 18 U.S.C. § 3582(c); USSG §1B1.10(d). Anticipating this amendment, on August 5, 1993, the petitioner filed a motion for modification of sentence. The government opposed any modification. On November 17, 1993, after careful consideration of the underlying facts and circumstances, i.e., under 18 U.S.C. § 3582(c)(2) and § 3553(a), the court concluded that the defendant received a proper sentence in this case and denied the motion. The petitioner appealed this issue to the Fifth Circuit. The court's order was affirmed on September 2, 1994.

On October 14, 1994, the petitioner filed the instant motion pursuant to 28 U.S.C. § 2255, asserting the ineffective assistance of his counsel. While this motion was pending, on April

21, 1995, the petitioner filed a motion to amend his original § 2255 motion and add a claim of §5K2.13, diminished capacity. The petitioner then filed a motion for writ of mandamus with the Fifth Circuit seeking to compel this court to rule on his motions. This motion was denied by the appeals court on September 7, 1995. Undaunted, the petitioner served on the court a motion for summary judgment on September 21, 1995. In this motion, the petitioner argued that his counsel failed to obtain a lab report which would have revealed the amount of drugs he was responsible for. The petitioner also reargues the use of the amended method of calculating LSD. This motion will be denied.¹ Finally, on February 7, 1996, the petitioner filed a second motion to amend, claiming a violation of the Speedy Trial Act. 18 U.S.C § 3161 et seq. The court will allow the amendment but will deny the

¹The petitioner admits in his § 2255 motion that the amount of drugs involved in Counts 2 and 4 according to the method of calculation at sentencing was one (1) gram. Furthermore, the court will not revisit its prior ruling denying modification based on the amended method of calculation.

requested relief.² Thus, the court examines the ineffective assistance of counsel claims.

INEFFECTIVE ASSISTANCE OF COUNSEL

In gauging whether counsel effectively assisted the petitioner during the trial, plea or sentencing stages, the court is guided by the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Strickland requires that a habeas corpus petitioner establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that the deficient representation prejudiced the defense so much that the results of the proceeding would have been different. Strickland, 466 U.S. at 687-88; United States v. Samples, 897 F.2d 193, 196 (5th Cir. 1990). In the context of a guilty plea case, the second element requires that the petitioner prove that but for

²The petitioner was arraigned on February 6, 1992, where he entered a plea of not guilty. Trial was set for March 30, 1992. The petitioner moved on three subsequent occasions for a continuance of his trial. The court granted the motions noting that petitioner's counsel needed additional time to effectively prepare for trial. In so doing, the court cited to 18 U.S.C. § 3161(h)(8)(A)(iv) of the Speedy Trial Act, which provides for continuances and the exclusion of time to allow counsel reasonable time to prepare for trial. Trial was eventually set for November 9, 1992, and on that date the petitioner pled guilty. The petitioner's argument that his trial was not timely under the Act is specious and disingenuous considering the fact that the delays were caused solely by his own requests for continuances. See United States v. Russo, 550 F. Supp. 1315 (D.N.J. 1982), aff'd, 722 F.2d 736 (3rd. Cir. 1983), cert. denied, 464 U.S. 1045 (1984).

his counsel's errors, he would not have pleaded guilty and would have insisted on trial. Hill v. Lockhart, 474 U.S. 52, 59, 88 L. Ed. 2d 203 (1985). The petitioner must show that there is a reasonable probability that but for counsel's error, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 694. A petitioner's failure to establish either prong of the test warrants rejection of the claim. Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986), cert. denied, 482 U.S. 916 (1987).

The petitioner's original ineffective assistance of counsel claim is divided into two arguments. First, the petitioner argues that his counsel failed to object to the sentencing court's use of the total 400 units of LSD which were distributed throughout the life of the conspiracy. Second, and perhaps redundantly, the petitioner argues that his counsel failed to object to the court's "implicit" combination of the total LSD units without an express finding in accordance with the provisions of §1B1.3 (allowing enhancement for other quantities which are not the basis for conviction).

Both of petitioner's arguments can be disposed of through the application of the prejudice prong of the Strickland test. Even if the court were to assume that the sentencing guideline range should only be calculated according to the amount of LSD that was involved in Counts 2 and 4, the petitioner has failed to demonstrate that he is prejudiced by this alleged error. By the petitioner's own

admission the "quantity of LSD contained in counts two and four total 'one gram.'" See § 2255 petition at 6. All parties are in agreement as to this amount. Accordingly, if the petitioner was sentenced, using the same guidelines (1990 ed.), the offense level would not change. The "Drug Quantity Table" of §2D1.1(c)(9) provides for a base offense level of 26 for amounts of LSD that are "at least 1 G but less than 4 G" Thus, whether the court calculates the petitioner's sentence based on 2.43 grams or 1 gram, the results under the applicable guidelines are the same.

In the petitioner's first motion to amend his § 2255 petition, he contends that his counsel was also deficient in failing to move for a downward departure on the ground of diminished capacity, USSG §5K2.13. A downward departure based on §5K2.13 is in the complete discretion of the trial court and is not warranted unless the defendant establishes by a preponderance of the evidence that: (1) he committed the offense while suffering from a significantly reduced mental capacity; (2) his reduced mental capacity was not caused by the voluntary use of intoxicants; (3) there was a direct causal connection between such mental capacity and defendant's commission of the offense; and (4) the defendant's criminal history does not indicate that incarceration is necessary to protect the public. Venezia v. United States, 884 F. Supp. 919, 924-25 (D.N.J. 1995).

The petitioner claims that on July 2, 1990, he was involved in a motor vehicle accident. This, and several subsequent operations, allegedly subjected him to episodes of severe headaches, unconsciousness, dizziness, loss of memory and identity. According to the petitioner, these maladies continued "until the last operation in which petitioner/patient finally had the problem corrected" on March 5, 1991.

Based on the record of the criminal case and considering the numerous exhibits submitted by the petitioner, the court concludes that there was no reasonable probability that a request for a downward departure would have changed the sentence. The actions of the petitioner during the course of the conspiracy do not indicate the presence of a diminished mental state. Instead, they reflect a conscientious and concerted effort to distribute a controlled dangerous substance and conceal the same from the police. The petitioner's willingness to cooperate when approached by the authorities (to arrange a buy from his source) underscores the petitioner's ability to appreciate the consequences of his actions.³ Thus, the petitioner has wholly failed to produce evidence that if accepted as true would have led to a reasonable probability that he would have received a lighter sentence. The

³Even if the petitioner could satisfy criteria 1, 2 and 3, the court concludes that, among other factors, the seriousness of the offense demonstrates that the protection of the public required that he serve a significant prison term.

petitioner therefore has failed to establish his claim for ineffective assistance of counsel.⁴

For the foregoing reasons, it is ORDERED:

That the petitioner's claim for relief
pursuant to 28 U.S.C. § 2255 is DENIED.

THIS, the ____ day of February, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

⁴An evidentiary hearing in this case is not required as it conclusively appears from the record that the petitioner is not entitled to relief. Tillis v. United States, 449 F.2d 224 (5th Cir. 1971).